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REPORT
101-520

ENVIRONMENTAL CLEANUP ACTIVITIES

OCTOBER 11 (legislative day, OCTOBER 2), 1990.—Ordered to be printed

M . BURDICK, from the Committee on Environment and Public Works, submitted the following

REPORT

[To accompany S. 3187]

The Committee on Environment and Public Works reports an original bill (S. 3187) to address immediate problems affecting environmental cleanup activities and recommends that the bill do pass.

GENERAL STATEMENT

During a hearing on September 19, 1990 of the Subcommittee on Superfund, Ocean and Water Protection, numerous witnesses, including environmentalists, Superfund cleanup contractors, representatives of union workers engaged in Superfund cleanup, and representatives of the insurance industry testified about how the unavailability of required surety bonds for Superfund cleanup projects was currently reducing competition for these projects, with the potential of increasing costs to the government, and could potentially slow the pace of the program. Testimony indicated that this unavailability was resulting from a lack of legislative clarity about the obligations and liabilities of sureties issuing bonds for Superfund projects.

In the context of an amendment to section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the reported legislation, which is supported by the Sierra Club, the Environmental Defense Fund, the Laborers International Union of North America AFL-CIO, the National Constructors Association, the Associated General Contractors of America, and the American Insurance Association, responds to this problem essentially in two narrow ways. First the legislation makes clear that where a surety providing bonds begins activities to meet its obligations under such a bond (as for example where

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the surety takes over a cleanup contract after a contractor default), the surety's Superfund liabilities and access to Superfund indemnification should be the same as those the response action contractor has under CERCLA. Second, with respect to surety bonds required by federal law for any direct Federal procurement of a response action contract, the legislation clarifies which parties have rights of action as well as the surety's contractual liabilities for such actions, which arise under the bond.

Background and Need

On September 19, 1990 the Subcommittee on Superfund, Ocean and Water Protection examined whether the Superfund cleanup contracting effort was facing problems due to unavailability of federally required surety bonds. Testimony from environmentalists, Superfund cleanup contractor representatives, representatives of union workers engaged in Superfund cleanup, and representatives of the insurance industry demonstrated that unavailability of required surety bonds for Superfund cleanup construction projects was currently reducing competition for these projects, potentially driving up their costs, and could slow the pace of the program. Testimony indicated that this unavailability was resulting from a lack on legislative clarity about the obligations and liabilities of sureties issuing bonds for Superfund projects.

The representative for the National Constructors Association testified in the hearing that bonding unavailability prevents the majority of construction companies from bidding for cleanup projects at the larger sites, indicating that only two companies, which share one surety, are currently able to bid on such projects. According to the testimony, the lack of sureties diminishes competition among contractors, since only a limited number of contractors may be able to compete for construction jobs requiring bonding. According to various witnessess a serious lack of competition is currently resulting from this problem, and this lack of competition may already be driving up the price for Superfund cleanup work. Some testimony predicted that surety unavailability would lead to severe disruptions in the pace and quality of the cleanup program.

Supplementing the views of the witnesses is a July 1990 report of the U.S. Army Corps of Engineers, "Hazardous and Toxic Waste Contracting Problems" (hereafter referred to as the "Corps Report"). The report, which was commissioned by the U.S. Environmental Protection Agency (EPA), documented many of the same concerns raised in the hearing. The Corps report identified a number of options for addressing the problem. The Corps described the longer-term options as follows: "Finally, longer term actions could be carried out which concentrate on potential legislative revisions to the liability and indemnification provisions in the [S]uperfund statute." (Corps Report at 3).

Strong support for immediate legislative action, which included some of the legislative options identified by the Corps report, as well as additional recommendations, arose from all witnesses during the hearing with the exception of the EPA. While the Agency acknowledged that the program already was experiencing lack of competition among cleanup contractors, the Agency ex-

pressed hope that these problems could be addressed administratively. It should be noted, however, that not only was EPA the lone witness taking this position, but the EPA's position did not seem to take account of the acknowledgment in the Corps Report that long-term options for addressing the problem could include legislative revisions. It should also be noted that EPA was unable to document whether satisfactory alternatives to surety bonds would be available for all the cleanup projects, requiring such bonds, which are expected to be commenced in the coming fiscal year.

In light of the EPA-commissioned Corps Report, as well as strong support for immediate legislation expressed during the hearing by th Sierra Club, the Laborers International Union, the Associated General Contractors Association of America, the National Constructors Association of America, and the American Insurance Association, and in light of EPA's own acknowledgment of current lack of competition, the Committee concluded that immediate legislation was necessary to address the competition problem and to avoid disruptions in the national cleanup effort.

Following the specific legislative recommendations of the witnesses, in the context of an amendment to CERCLA section 119, the legislation essentially provides two categories of narrow clarification.

First, by modifying the definition of "response action contractor," in section 119(e)(2) of CERCLA, the legislation makes clear that where a surety providing bonds begins activities to meet its obligations under such a bond (as for example where the surety takes over a cleanup contract after a contractor default), the surety's Superfund liabilities and access to Superfund indemnification should be the same as those the response action contractor has under CERCLA.

Second, by adding a new subsection (g) to section 119 of CERCLA, which addresses concerns about the availability of surety bonds required by Federal law for any direct Federal procurement of a response action contract, the legislation makes clear which parties have rights of action as well as the surety's contractual liabilities for such actions arising under such a bond. The new subsection (g) is narrowly written to address only the specific problem identified in the hearing, which occurs when applicable Federal law requires surety bonds for a direct Federal procurement of a response action contract. New subsection (g) applies only to such direct Federal procurements (typically referred to as "Federal Lead" procurements), if under applicable Federal law, surety bonds are required for such procurements, and does not affect such procurements as any State procurements (such as State Lead Superfund response action contracts), or privately procured response action contracts.

New subsection (g) makes clear that the new subsection does not preempt, limit, supersede, affect, apply to, or modify any State law, regulations, requirements, rules, practices, or procedures. Even where applicable Federal law requires surety bonds for a direct Federal procurement, new subsection (g) also makes clear that its clarifications relate only to rights, authorities, liabilities, demands, actions, causes of action, losses, judgments, claims, statutes of limitation, or obligations, which arise under a bond, where, for example, the surety is secondarily liable by virtue of the bond, for acts

of the contractor, as distinguished from liabilities that might arise for acts by the surety itself. New subsection (g) does not preempt, limit, supersede, affect, apply to, or modify the rights, authorities, liabilities, demands, actions, causes of action, losses, judgments, claims, statutes of limitation, or obligations with respect to the Government or a contractor itself. (In other words, for example, new subsection (g) would not affect the rights of action or liabilities that might arise in a suit against the Government or a cleanup contractor).

ANALYSIS OF THE BILL

The bill consists of one section. Paragraphs 1 and 2 of section 1 of the bill, by supplementing the definition of "response action contractor" in section 119(e)(2), clarify that Superfund sureties providing bonds and taking steps to begin to meet their obligations under such bonds are entitled to the same protections from liability and availability of indemnification as the Superfund law provides to response action contractors. In effect what this provision clarifies is that when sureties take on the responsibilities of Superfund response action contractors, they will be treated in the same manner with respect to the liability and indemnification established under Superfund.

Paragraph 3 of section 1 creates a new subsection (g) in section 119 of CERCLA. This new subsection in paragraph (g)(1) first clarifies that where the Miller Act, the applicable Federal bonding law, requires surety bonds for direct Federal procurement of cleanup contracts, such bonds shall be issued in accordance with this law. The primary purpose of this provision is to assure that this legislation does not create an implication that the Federal bonding statute, the Miller Act, is not applicable because this legislation was enacted subsequent to the Miller Act. In other words, the goal is to maintain existing law with respect to the application of such other Federal laws.

The new subsection in paragraph (g)(2) states that only the obligee, the party intended to be protected by the performance bond, can sue the surety on such bonds. This still leaves third parties free to sue other parties, including contractors, and the government. But following the general trend in surety law, only the obligee, would be able to sue the surety itself. The provision in no way limits the procuring agency's discretion to name any party or parties as obligee.

The new subsection (g)(3) also clarifies that if under applicable Federal law surety bonds are required for any direct Federal procurement of any response action contract, unless otherwise provided for by the government, in the event of a default, the surety's liability on a performance bond shall be only for the cost of completion of the contract work in accordance with the plans and specifications less the balance of funds remaining to be paid under the contract, up to the penal sum (the amount of maximum liability specified in the bond). The new paragraph (g)(3) further makes clear that the surety shall not be liable on bonds to indemnify or compensate an obligee for loss or liability arising from personal

injury or property damage whether or not caused by a breach of the bonded contract.

The new subsection at paragraph (g)(4) makes clear that the new subsection does not preempt, limit, supersede, affect, apply to, or modify any State law, regulations, requirements, rules, practices, or procedures. Paragraph (g)(4) also indicates that even where applicable Federal law requires surety bonds for a direct federal procurement, the clarifications of new subsection (g) relate only to rights, authorities, liabilities, demands, actions, causes of action, losses, judgments, claims, statutes of limitation, or obligations, which arise under a bond (where, for example, the surety is secondarily liable by virtue of the bond, for acts of the contractor, as distinguished from being liable for acts by the surety itself).

ROLLCALL VOTES

Section 7(b) of rule XXVI of the Standing Rules of the Senate and the Rule of the Committee on Environment and Public Works require that any rollcall vote taken during consideration of the reported bill be announced in the report.

The Committee on Environment and Public Works considered the original bill at a meeting on October 4, 1990. The Committee ordered the bill reported to the Senate by voice vote. No rollcall votes were taken during consideration of the bill.

REGULATORY IMPACT

In compliance with Section 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact of the reported bill. The reported bill does not include any new regulatory authority, but it is anticipated that any regulations or guidelines required pursuant to section 119(c)(7) of CERCLA would be issued to reflect the legislation's clarifications and modifications to that section.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Act requires that each report contain a statement of the cost of the reported bill prepared by the Congressional Budget Office. That report follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 10, 1990.

Hon. QUENTIN N. BURDICK,
Chairman, Committee on Environment and Public Works, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed a bill to address immediate problems affecting environmental cleanup activities, as amended and ordered reported by the Senate Committee on Environment and Public Works on October 4, 1990. We estimate that enactment of this bill would result in no additional cost to the federal government or to state and local governments.

This bill would amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 to clarify that, whenever a surety bond is required of a Superfund cleanup contractor, the surety is only liable for the cost of completion of the contract work less the balance of funds remaining to be paid under the contract, up to the penal sum of the bond. In addition, under this bill, sureties called upon to meet their obligations under the bond would have the same liability as other Superfund response action contractors. Based on information from the Environmental Protection Agency, we expect that, in the event of a default on a Superfund contract, the provisions of this bill would not reduce the amount that the government could collect from sureties.

If you wish further details on this estimate we will be pleased to provide them. The CBO staff contact is Kim Cawley, who can be reached at 226–2860.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer).

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by this bill, as reported, are shown as follows: Existing law to be omitted is enclosed in black brackets; new language is printed in italic; and existing law to which there is no change is shown in roman.

THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) (P.L. 96–510) AS AMENDED BY THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986 (P.L. 99–499)

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SEC. 119. RESPONSE ACTION CONTRACTORS.

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(e) DEFINITIONS.—For purposes of this section—

(1) RESPONSE ACTION CONTRACT.—The term "response action contract" means any written contract or agreement entered into by a response action contractor (as defined in paragraph (2)(A) of this subsection) with—

(A) the President;

(B) any Federal agency;

(C) a State or political subdivision which has entered into a contract or cooperative agreement in accordance with section 104(d)(1) of this Act; or

(D) any potentially responsible party carrying out an agreement under section 106 or 122;

to provide any remedial action under this Act at a facility listed on the National Priorities List, or any removal under this Act, with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from the facility or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for such facility.

(2) RESPONSE ACTION CONTRACTOR.—The term "response action contractor" means—

(A) any—

(i) person who enters into a response action contract with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a facility and is carrying out such contract; and

(ii) person, public or nonprofit private entity, conducting a field demonstration pursuant to section 311(b); and

(B) any person who is retained or hired by a person described in subparagraph (A) to provide any services relating to a response action[.]; *and*

(C) any surety who provides a bid, performance or payment bond to a response action contractor, and begins activities to meet its obligations under such bond.

(3) INSURANCE.—The term "insurance" means liability insurance which is fair and reasonably priced, as determined by the President, and which is made available at the time the contractor enters into the response action contract to provide response action.

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(g) SURETY BONDS.—

(1) If under the Miller Act, 40 U.S.C. sections 270a–270f, surety bonds are required for any direct Federal procurement of any response action contract, they shall be issued in accordance with 40 U.S.C. sections 270a–270d.

(2) If under applicable Federal law surety bonds are required for any direct Federal procurement of any response action contract, no right of action shall accrue on the performance bond issued on such response action contract to or for the use of any person other than the obligee named in the bond.

(3) If under applicable Federal law surety bonds are required for any direct Federal procurement of any response action contract, unless otherwise provided for by the procuring agency in the bond, in the event of a default, the surety's liability on a performance bond shall be only for the cost of completion of the contract work in accordance with the plans and specifications less the balance of funds remaining to be paid under the contract, up to the penal sum of the bond. The surety shall in no event be liable on bonds to indemnify or compensate the obligee for loss or liability arising from personal injury or property damage whether or not caused by a breach of the bonded contract.

(4) Nothing in this subsection shall be construed as preempting, limiting, superseding, affecting, applying to, or modifying and any State laws, regulations, requirements, rules, practices or procedures. Nothing in this subsection shall be construed as affecting, applying to, modifying, limiting, superseding, or preempting any rights, authorities, liabilities, demands, actions, causes of action, losses, judgments, claims, statutes of limitation, or obligations under Federal or State law, which do not arise on or under the bond.

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